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Contracts-Recovery under Void Agreement

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CONTRACTS—RECOVERY UNDER VOID AGREEMENT—Plaintiff and defendant had entered into a contract whereby plaintiff was to take over the execution management of, and to underwrite, the defendant company for 20 years. The contract was declared void, after the parties had transacted considerable business under it, because it was against public policy. Plaintiff sued to recover for services rendered and money advanced on the faith of the unlawful contract. *Held*, claim for recovery of unused portion of fund advanced by plaintiff, and for recovery of another sum involving six unexplained items, allowed. In the course of its opinion, the court said: "Courts have very generally striven to do justice between the parties by permitting property or money parted with, or services rendered on the faith of such unlawful contracts, to be recovered or compensated for, notwithstanding the invalidity of the contract." *Sherman & Ellis, Inc. v. Indiana Mutual Casualty Co.*, 41 Fed. Rep. (2nd) 588.

The general rule is that the law will not enforce a contract founded on a violation of law. *Clarke v. Southern Ry. Co.*, 69 Ind. App. 697; *Duance v. Merchants' Legal Stamp Co.*, 231 Mass 113; *Jackson v. City of Columbia*, 217 S. W. 869; *Railroad Stores v. Fabyan & Co.*, 197 N. Y. S. 815. Nor will it aid either party to an alleged contract, but will leave them both where it finds them. *Southern Cotton Oil Co. v. Knox*, 202 Ala. 694; *International Coal & Mining Co. v. Industrial Commission*, 293 Ill. 524; *Baylston Bottling Co. v. O'Neill*, 231 Mass. 498; *People v. Carlin*, 181 N. Y. S. 389. The reasons generally accepted for the observance of this rule are: (1) it operates to inflict punishment upon plaintiff for participating in unlawful transactions; *McCullen v. Hoffman*, 174 U. S. 639 (2) It warns those contemplating illegal transactions that they enter upon

them at their own risk and must bear all the consequences; *Russell v. Courier Printing, etc., Co.*, 43 Colo. 321. (3) It saves the courts from the indignity of attending to disputes of lawbreakers; *Smith v. Richmond*, 114 Ky. 303. (4) It permits the courts to be free to try suits of honest litigants; Cooley, *Torts* (3d Ed.), p. 261.

But the rule that courts will not aid a party to an illegal transaction to enforce it, set it aside, or recover back money or property is held subject to exceptions as well established as the rule; *In re Progressive Wall Paper Corp.*, 229 Fed. 489. Two of the categorical grounds for the exceptions are: (1) Plaintiff was ignorant of the facts making the contract illegal. If plaintiff, when he conferred the benefit sought to be recovered, was ignorant of the fact which makes the contract illegal, relief will be afforded; Woodward, *Quasi Contracts*, sec. 137. (2) Plaintiff was not in *pari delicto*. In the case of a contract *malum in se*, no difference in the degree of delinquency of either party is recognized; but if the contract is *malum prohibitum* and if plaintiff is not in *pari delicto*, restitution is enforced; *Weninger v. Mitchell*, 139 Mo. App. 420. "Probably no more exact principle can be laid down than this, that if a plaintiff, though culpable, has not been guilty of moral turpitude, and the loss he will suffer by being denied relief is wholly out of proportion to the requirements either of public policy or of appropriate individual punishment, he may be allowed to recover back the consideration with which he has parted." *Williston on Contracts*, sec. 1789. See also *Berman v. Coakley*, 243 Mass. 348.

Although the parties are in *pari delicto*, the court may interfere and grant relief at the suit of one where public policy requires its intervention, albeit some benefit will thereby accrue to a plaintiff equally as guilty as defendant. *Western Union Telegraph Co. v. Burlington, etc., R. Co.*, 11 Fed. 1; *Duval v. Wellman*, 124 N. Y. 156.

Where a contract against public policy has been executed and benefits received, and all parties are acting in good faith, compensation on the *quantum meruit* or *quantum valebat* will be allowed. *Tallman v. Lewis*, 186 S. W. 296. In that case, the contract was against public policy because one of the parties at the time of its execution acted in a fiduciary capacity; and, he having executed it without objection, and actual benefits having been received under it, all the parties acting in good faith, compensation was allowed on a *quantum meruit* count for the reasonable value of the services rendered. Where an illegal contract has been fully executed by the parties, the courts will recognize the rights and titles resulting therefrom, where the suit is not to enforce the contract itself. So it was held in *Hall v. Edwards*, 194 S. W. 674, in which, after proof that defendant's grantors, owning lots in section devoted to houses of prostitution, had constructed and sold them for immoral purposes, and after evidence that true consideration passed, the court ruled that when a contract has been executed without the aid of the courts by the voluntary acts of the parties, the profit or estate realized is not contaminated. The conclusion to be drawn from these and many similar cases is that the courts will, if one side has executed completely and in good faith, award a *quantum meruit* or *quantum valebat* compensation; and that if both sides have performed, the courts will recognize their new position but will not do anything to change

it. The distinction here between executed and executory contracts must be observed; the former is used to designate contracts completed by both parties; the latter—for the purpose of clarifying the rule stated —, to describe a contract fully executed by one party, but not by both. Of course, there cannot be, to use terms logically, an illegal, executed contract: the phrase is a contradiction in terms; for the words *illegal* and *executed* each indicate the non-existence of contractual rights. The expression is one conveniently employed to describe what the parties *thought* they *had*. The cases enumerated, therefore, involve recovery to the extent that they reveal the courts recognizing and maintaining positions of parties illegally attained, or giving compensation to one who has in good faith rendered services under a non-existent contract.

Where a contract made by a corporation to sell unissued stock for a price payable in installments, was not *malum in se* and not completely executed, a buyer was permitted to recover back money paid. *Fitzgerald v. Guaranty Security Corporation*, 239 Mass. 174. It appears therefrom that if the contract is not *malum in se*, courts will permit recovery, provided the contract remains executory; and that if the contract is *malum in se*, no recovery is allowed, even though the agreement is not executed.

So long as the contract is void as against public policy and remains executory or partly incomplete, either party may sue to set it aside and recover all he has expended or conveyed in part performance thereof. *Boyd v. Boyd*, 112 Ore. 685. And where a contract for illegal purposes was abandoned, there could be recovery of money deposited under it, provided recovery itself did not accomplish the illegal purpose or require resort to illegal portions of it. *Green v. Frahm*, 176 Cal. 259. While the courts will not assist in enforcing illegal contracts, either party may disaffirm executory contracts involving no moral turpitude, but simply prohibited by law, and recover money paid. *Duane v. Merchants' Legal Stamp Co.*, *supra*.

When labor and materials have been furnished upon real estate under a contract containing an element violating a statutory prohibition, and when the contract remains entirely executory in that part which is illegal, and is disaffirmed because of its illegality, the disaffirming party has the same right to have compensation for the benefit conferred that he would have to recover for money or property received by the other party before disaffirmance of the contract. *Eastern Expanded Metal Co. v. Webb, etc., Co.*, 195 Mass. 356. From the foregoing cases of this type, then, the rule appears to be that when the plaintiff withdraws from the contract before its illegal purpose is accomplished, he is entitled to recover.

One who expended money, renders services, or performs work under an agreement which is void and unenforceable, but not illegal, may recover for the value of his services and money expended in an action on a *quantum* count. *Blair Engineering Co. v. Page Steel & Wire Co.*, 288 Fed. 662. And one who performs services for an individual or private corporation under a void contract may recover for such services on the ground that the law raises an implied promise to pay a reasonable value therefor. *Staebler & Gregg v. Town of Anchorage*, 216 S. W. 348; *Murphy v. Mitchell*, 254 Mass. 18. Recovery on the basis of a promise implied in law is recovery in quasi contract. *Underhill v. Rutland Ry. Co.*, 90 Vt. 462.

Quasi contract rests upon the equitable principle that one may not enrich himself at another's expense; it rests, not upon the contract, but upon the obligation created by law in the absence of any agreement thereon. *Miller v. Schlass*, 218 N. Y. 400; *Grossbier v. Chi., St. P., M. & O. Ry. Co.*, 173 Wis. 503. But if the illegal contract is fully performed on both sides, there is no basis for quasi contractual obligations. *Stansfield v. Kunz*, 62 Kan. 797.

To establish the existence of any quasi contractual obligation, it must be shown, (1) that the defendant has received a benefit from the plaintiff; and (2) that the retention of the benefit by the defendant is inequitable. Woodward, *op cit.*, Sec. 7.

H. W. J.